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IN THE

SUPREME COURT OF THE UNITED STATES

RAYMOND EDWARD JAMES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Raymond Edward James, respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit, filed on April 9, 1982 (see attached Appendix "A").

OPINION BELOW

The Opinion of the Court of Appeals is attached as Appendix "A".

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I.

Did the Circuit Court misread Rule 4(a), Fed. R. App. P. when it dismissed his appeal for lack of jurisdiction?

II.

Can petitioner be deprived of appellate review of a Rule 35 denial when the District Court failed to act within the 120-day time period, something petitioner has no control over?

III.

Did petitioner have his due process rights violated when his Rule 35 motion was decided by a Judge other than his sentencing Judge, who was still a member of the federal judiciary and was a member of the District of Oregon bench by designation of the Chief Judge of the Circuit?

IV.

Can petitioner be denied appeallte review after the time for appeal has lapsed for reasons that are not within the control or purview of the petitioner?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

Petitioner was convicted of an indictment of armed bank robbery in violation of 18 U. S. C. § 2113(d) and 2. [1] Upon conviction by a jury trial he received a twenty year prison sentence to run consecutively to a sentence he was already serving (RT 417-418; CR 126).

This conviction was upheld on direct appeal (Case No. 79-1443) and certiorari was denied by this Honorable Court (Case No. 79-6410).

On January 19, 1981, petitioner filed a timely motion for reduction of sentence pursuant to Rule 35, Federal Rules Criminal Procedure (CR 162). On July 7, 1981, the motion was denied by the Honorable Robert C. Belloni (CR 165).

After not receiving a copy of Judge Belloni's denial order of July 7, 1981, petitioner in late September 1981 became aware of said denial order while obtaining related case materials from the Clerk on another appellate matter.

On September 22, 1981, petitioner filed a Motion for leave to file an out of time appeal of the Rule 35 denial, which was granted on December 10, 1981 by Chief Judge James M. Burns (see attached Appendix "B").

On January 4, 1982, the Notice of Appeal (prepared by the District Court Clerk at Judge Burns" instructions) was docketed in the United States Court of Appeal for the Ninth Circuit (Docket No. 81-1772).

On February 17, 1982, the government filed a motion with the Circuit Court requesting this case be consolidated with No. 81-1802, another appeal arising from the same conviction pursuant to Rule 41(e), Federal Rules Criminal Procedure.

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1. As used hereafter, "CR" denotes the Clerk's record; "RT" denotes the trial transcript; and "G.Br." denotes the government's brief on appeal.

On February 24, 1982, the Circuit Court granted the Motion to consolidate the two appeals (Nos. 81-1772 & 81-1802). Petitioner did not object to this consolidation.

On March 1, 1982, the government filed its brief for Plaintiff-Appellee in both appeals.

Petitioner did not file any reply briefs in this matter.

On April 9, 1982, two jurists of the Circuit Court Order the appeal in 81-1772 dismissed for lack of jurisdiction (see attached Appendix "A") and it is from this Order that petitioner moves this Honorable Court for a writ of certiorari.

ARGUMENT

I.

DID THE CIRCUIT COURT MISREAD RULE 4(A), FED. R. APP. P. WHEN IT DISMISSED HIS APPEAL FOR LACK OF JURISDICTION?

Petitioner contends the Circuit Court misread the intent of Rule 4(a), Fed. R. App. P. when it dismissed his appeal for lack of jurisdiction. The court below has erroneously relied on Pettibone v. Cupp, 666 F. 2d 333 (9th cir. 1982), a case which bears no similarity whatsoever to petitioner's circumstances. In Pettibone (supra) the court was dealing with a state prisoner who, having received the denial order of the District Court, failed to file a timely appeal to the Circuit Court. This was a habeas corpus matter, which is entirely dissimilar from a Rule 35 motion. And in Pettibone)supra) the government objected to the untimely filing of said appeal. Hence, the Circuit Court denied same for lack of jurisdiction, and properly so.

But here we have an instance of where the Chief Judge of the District, realizing petitioner had never received a copy of any Rule 35 denial order, granted a motion for petitioner to file an untimely appeal, and even had the District Court clerk file the Notice of Appeal in petitioner's behalf. Also the Government did

not contest the Court's findings in allowing said untimely appeal (see attached Appendix "C").

Rule 4(a), Federal Rules of Appellate Procedure is quite plain in its language. It states:

> Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired it shall be made by motion with such notice as the court shall deem appropriate.

Petitioner contends the key words to this rule are "excusable neglect." The court below ruled the District Court lacked the authority to extend the time for filing an appeal. This after the government did not even contest the District Court's decision. It is obvious that Judge Burns discovered that petitioner had never been served with a copy of the Rule 35 denial order [Appendix "B"] and the only just remedy was to permit an untimely appeal to the Circuit Court.

II.

CAN PETITIONER BE DEPRIVED OF APPELLATE REVIEW OF A RULE 35 DENIAL WHEN THE DISTRICT COURT FAILED TO ACT WITHIN THE 120-DAY TIME PERIOD, SOMETHING PETITIONER HAS NO CONTROL OVER?

Petitioner contends this is a case of first impression on this issue inasmuch as this issue has never been resolved by the nation's highest tribunal. Various Circuits around the country interpret Rule 35 in different ways, some literal interpretations and some liberal interpretations. But petitioner contends that no prisoner should be penalized because of the inaction of the District Court on a Rule 35 motion.

The very mixed reviews of the Ninth Circuit on this issue need resolution by a higher and final authority. Petitioner finds it

remarkable that the same Judge of the Ninth Circuit, Judge Choy, has ruled in this matter twice, stating exactly the opposite on both occasions. In United States v. United States District Court, C.D.California, 509 F. 2d 1352, 1356 (9th Cir. 1975) he ruled that a District Judge could go beyond the 120-day time limit set by Rule 35 in deciding such a motion, stating that the time limit was flexible. Yet in United States v. Smith, 650 F. 2d 206, 209 (9th Cir. 1981) we find Judge Choy stating exactly the opposite, that tne time limit is inflexible and after 120 days the district judge loses jurisdiction to rule on such a motion. There is no explanation for this major inconsistency.

In petitioner's case the government pointed out, and aptly so, that the six month delay in answering his Rule 35 motion was unreasonable because there was nothing unusual or complex about the motion nor were any hearings or additional evidence required to enable the Court to expeditiously pass upon same. It should also be noted that the government never even bothered to file an answer opposing the Rule 35 motion in this case. Hence the extraordinary length of time between petitioner's timely application and the court's untimely answer remains a mystery.

Petitioner contends it would be a manifest injustuce to penalize him for the court's ineptitude.

III.

DID PETITIONER HAVE HIS DUE PROCESS RIGHTS VIOLATED WHEN HIS RULE 35 MOTION WAS DECIDED BY A JUDGE OTHER THAN HIS SENTENCING JUDGE, WHO WAS STILL A MEMBER OF THE FEDERAL JUDICIARY AND WAS A MEMBER OF THE DISTRICT OF OREGON BENCH BY DESIGNATION OF THE CHIEF JUDGE OF THE CIRCUIT?

Petitioner contends that his constitutional rights were denied when a judge other than the trier of fact in his case, the Honorable Otto R. Skopil, Jr., ruled upon his Rule 35 motion. The government erroneously argued in the court below that Judge Skopil

was no longer available nor a member of the District Court bench at the time of appellant's Rule 35 motion. However, the facts are that Judge Skopil was appointed to the Ninth Circuit bench on September 26, 1979, but sought and received designation from Chief Judge Browning of the Ninth Circuit to the District of Oregon bench. Petitioner contends that only the trier of fact and sentencing judge, in this case Judge Skopil, could render a fair and informed decision on the Rule 35 motion. 8A Moore's Federal Practice § 35-4 and 35.04; United States v. Williams, 613 F. 2d 573; United States v. Harper, 460 F. 2d 1024. It is improper for any judge other than the sentencing juige to rule on such a motion. United States v. Hamner, 496 F. 2d 917.

Petitioner would point out that prior to dismissal of his appeal in the court below this was the key issue raised in the Circuit Court, and that the matter should have been resolved at that level.

IV.

CAN PETITIONER BE DENIED APPELLATE REVIEW AFTER THE TIME FOR APPEAL HAS LAPSED FOR REASONS THAT ARE NOT WITHIN THE CONTROL OR PURVIEW OF THE PETITIONER?

When petitioner discovered that his Rule 35 motion had been denied and he had not even been notified by the District Court he immediately initiated a formal complaint with the Administrative Office of the United States Courts, who in turn contacted the Clerk of the District Court for a full report on the matter (see attached Appendices "D" & "E"). At the same time petitioner moved the District Court for permission to file an untimely appeal. Evidently the Chief Judge of the District felt petitioner's claim had merit, because he even had the court clerk prepare and file the Notice of Appeal with the Circuit Court.

Petitioner contends that it violates his due process rights

to deny him appellate review, ostensibly because of lack of jurisdiction, when he never had a fair and equal opportunity to file a timely appeal, due to the blunder of a deputy clerk of the District Court. While not of the same magnitude, petitioner can see a condemned person going to meet his maker because a court.clerk failed to transmit a stay of execution order to the penal officials. The same rationale applies here. One cannot appeal from a denial order he is unaware of! To expect petitioner to meet such exacting and ridiculous standards strains the bounds of credulity.

CONCLUSION

Petitioner prays this Court will grant certiorari and hear the matter of first impression herein, or order the matter back to the Circuit Court with instructions to hear the Rule 35 matter on the merits.

DATED this 3rd day of May, 1982.

Respectfully submitted,

Raymond Edward James

RAYMOND EDWARD JAMES
Petitioner, Pro Se

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SUPREME COURT OF THE UNITED STATES

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

RAYMOND EDWARD JAMES,
Petitioner,

vs.

UNITED STATES

Petitioner, Raymond Edward James, who is now held in a Federal Correctional Institution, asks leave to file the attached petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. The petitioner's affidavit in support of this motion is attached hereto.

Raymond Edward James
Petitioner, Pro Se

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AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

RAYMOND EDWARD JAMES,
Petitioner,

vs.

UNITED STATES

I, Raymond Edward James, depose and say that I am the petitioner in the above-entitled cause, and, in support of my application for leave to proceed without prepayment of costs or fees, state:

1. Because of my poverty I am unable to pay the costs of said cause.

2. I am unable to give security for same.

3. I believe that I am entitled to the redress I seek in said cause.

4. The nature of said cause is briefly stated as follows:

I was sentenced to the custody of the United States Attorney General by the United States District Court for the District of Oregon. That conviction was upheld on appeal to the Ninth Circuit Court of Appeals and this Honorable Court. Following denial of certiorari in October 1980 [Case No. 79-6410] I filed a timely motion for reduction of sentence pursuant to Rule 35, Federal Rules of Criminal Procedure. Because my sentencing judge had been elevated to the Ninth Circuit during the tenure of my direct appeal the Rule 35 was acted upon by another District Judge, who entered an order denying same on July 7, 1981. Through some mix-up petitioner was never provided with a copy of that order. Months later, through another inquiry to the District Court, petitioner then learned of the Rule 35 denial and immediately petitioned the Chief Judge of the District to file an untimely appeal of said order to the Ninth Circuit. The Chief Judge granted leave to file and petitioner immediately did so. After docketing same, permitting petitioner to file his brief and the government to respond, the Ninth

Circuit dismissed same for lack of jurisdiction (see attached Appendix "A").

I feel the denial of appeal of the Rule 35 matter violated my constituional rights to due process of law and equal protection of the laws as enunciated in the Fifth Amendment to the Constitution of the United States.

Raymond Edward James
Petitioner, Pro Se

I declare under penalty of perjury, that the foregoing is true and correct.

Executed this 3rd day of May, 1982.

Raymond Edward James
Petitioner, Pro Se